GLAD DAY BOOKSHOP
v.
DEPUTY MINISTER OF
NATIONAL REVENUE FOR
CUSTOMS AND EXCISE

TRIAL PROCEEDINGS

MAY 13, 1992

619/90

ONTARIO COURT OF JUSTICE

(Summary Conviction Appeals)

B E T W E E N :

GLAD DAY BOOKSHOP and JEARLD MOLDENHAUER

- Appellant

v.

DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

- Respondent

---Before THE HONOURABLE MR. JUSTICE HAYES, at the Metropolitan Toronto court house; Hearing Room No. 3, 21st Floor, 180 Dundas Street West, Toronto, on Wednesday, May 13, 1992.

T R I A L P R O C E E D I N G S

APPEARANCES:

C. CAMPBELL, Esq.
C. BARCLAY, Ms. — for the Appellant

B. WILSON, Ms.
V. BREWER, Esq. — for the Respondent

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FILE NO. 619/90

WEDNESDAY, MAY 13, 1992

---Upon commencing at 11:00 a.m.

BARRY ADAM: Sworn

EXAMINATION-IN-CHIEF BY MR. CAMPBELL:

Q. Now, Professor Adam, can you tell us, please, what profession and what position you hold?

A. I'm a professor of sociology at the University of Windsor.

Q. And generally speaking, what areas of specialization do you follow in your professional capacity?

A. Perhaps most relevant to this case is I design and teach a course in Theories of Sexuality.

THE COURT: Excuse me just a minute. Are you calling this man as an expert?

MR. CAMPBELL: Yes, sir.

THE COURT: Please place on the record what area of expertise in which he is qualified, as far as you are submitting, and what is the relevance of that area of expertise. I will allow you to examine the witness, and then I will allow cross-examination with respect to his qualifications, and then there will be a finding as to whether or not he may give evidence.

MR CAMPBELL: The three areas where I want to ask this witness some opinion evidence, expert evidence, are with respect to sexual practices: What are normal sexual practices; the best evidence with respect to the frequency of homosexual relationships; the frequency of sexual conduct; the nature of sexual conduct

in the gay community.

THE COURT: All right. The frequency of homosexual relationships, and what's the next one?

MR. CAMPBELL: The nature of the sexual conduct in the gay community. I just put those -- there's some related questions that would be subordinate to that, but in the area of sexual practices---

THE COURT: Those are the three things in which you say this man is qualified as an expert to give some evidence?

MR. CAMPBELL: Yes.

THE COURT: You may proceed.

MR. CAMPBELL: I'm sorry. I have not been clear enough. That's in the area of sexual practice. Those are the questions that I want to ask him about. Now, there's a second ---

THE COURT: Well, did you use any adjectives to describe sexual practices? I thought you did.

MR. CAMPBELL: I said he is an expert in the area of sexual practice. The particular questions I want to ask about are gay sexual practice.

THE COURT: You may enquire as to his qualifications.

MR CAMPBELL: Can I just tell you the other area, sir, so that I could go through the qualifications, because to some degree they overlap.

THE COURT: Yes.

MR. CAMPBELL: The second area I want to ask him some questions about is the nature of subordination, sexual subordination, in the gay community.

THE COURT: Yes.

MR. CAMPBELL: I think actually those two areas will cover it.

THE COURT: Would you like, then, to put forward what your evidence is with respect to proposed expertise?

MR. CAMPBELL: Q. Professor Adam, I'm showing you a copy of a curriculum vitae. Could you look at that and tell us whether or not that's your C.V.?

A. It is.

Q. I provided a copy of this to my friends, Your Honour, and if it will assist, I've marked that as Exhibit 6.

---EXHIBIT 6: Curriculum Vitae of Professor Adam.

MR. CAMPBELL: Q. Now, Professor Adam, let me start with the course that you mentioned that you teach. Could you tell us about that?

A. I currently teach a course called Theories of Sexuality, and it reviews a wide range of topics in sexuality, both heterosexual and homosexual, and includes sexual representation.

Q. All right. And Your Honour, forgive me, I just realized, when I was referring to the areas of expertise I omitted something. I also want to ask this witness, with respect to issues of harm in the gay community, what sexual practices are harmful or are perceived to be harmful.

THE COURT: Perceived by whom?

MR. CAMPBELL: I think the answer to that question is going to be perceived by the gay community, but there is some legal argument in there

whether or not we are judging on the basis of an objective standard of harm or a perceived community standard of harm, and I think that's something we're just going to have to struggle with.

THE COURT: I understand the point you're making, yes.

MR. CAMPBELL: Q. Professor Adam, going back to the course, in the course that you teach, do you cover the issues and the incidents of sexual behaviour both in the straight and the gay community?

A. Yes.

Q. And do you deal with the statistical evidence that is available that tells scholars the frequency of sexual practice in both the gay and the straight community?

A. Yes. It's readily available.

Q. And I understand you've written two books?

A. Yes.

Q. Perhaps the first book, the title was?

A. The Survival of Domination.

Q. And can you tell us, when did you write that book?

A. It was published in 1978, written just before that.

Q. And tell us what that book is about.

A. The subtitle of the book is "Inferiorization in Everyday Life". The book compares evidence on black, Jewish, and gay people concerning the

effects of subordination or inferiorization on their lives and the ways in which they deal with that.

Q. And the second book that you published, what's the name of that?

A. The second book is called <u>The Rise of a Gay and Lesbian Movement.</u>

Q. What is that book about?

A. That book, then, turns to a socio-historical level of analysis from a socio-psychological level and continues the themes of the issues of subordination and empowerment to see how subordinated people can and do organize themselves and debate their place in the community and their place in larger society.

Q. All right. And have you -- when was that book written?

A. 1987.

MR. CAMPBELL: I have a copy of that, Your Honour, for any reason that you want to see that.

Q. Since you wrote each of these books, have you continued to write and follow the issues that are raised in those books in the academic literature?

A. Yes, indeed. I'm fairly extensively published in the academic literature in the form of articles of any similar themes, and gay studies in empowerment and domination.

Q. And your C.V. sets out some of the arguments that you have written?

A. It does.

Q. Now, can you tell us a little bit

about your academic positions outside the formal teaching position. What organizations are you ---

A. I'm currently a member of sociological associations in Canada, the United States, and internationally. I'm chairman of the Committee on Professional Ethics of the Canadian Sociology and Anthropology Association, and a member of the executive committee of that association. I'm also a member of the International Aids Society, and because I do work also in Latin America, I'm a member of the Canadian Association of Latin American and Caribbean Studies.

Q. Now, Professor Adam, I want to ask you some questions with respect to the issues of what may be harmful sexual activities or harmful social activities between gay men. Is that topic something that's covered in your book or something that you have written about or would be knowledgable about because of your work?

A. I believe I can address that in terms of public debates that have occurred within feminism and in dialogue between feminism and the gay movement concerning questions of sexuality and sexual representation.

Q. And similarly, I want to ask you some questions about the nature and meaning of subordination as it may be observed within gay sexual practices. Are you able to comment on that?

A. I can comment on the existing research literature. I have not done original research in that specific area.

THE COURT: You have not done what?

THE WITNESS: Original research on the specific issue of sexual subordination. Rather, I've done research on domination and subordination issues and on sexuality.

THE COURT: Excuse me. I just want to understand you. I have not done original research in respect of what? Now say it again.

THE WITNESS: Sexual subordination, I believe that was the term.

THE COURT: Yes, but you've added something else after that.

THE WITNESS: I believe I mentioned earlier that I have done research on aspects of domination, inferiorization, subordination relating to the gay community, and also I teach in the area of sexuality.

THE COURT: It would be helpful, counsel, if you could so direct your witness so that I understand, in assessing his probable expertise, whether we're talking about something that he knows about as a result of his own work, namely, original research, and how he knows about it and where and or whether his research is confined to literature.

MR. CAMPBELL: Right.

Q. Professor Adam, could we make clear when you talk about the issue of domination, in what aspect of that did you do what we would all call, I believe, original research?

A. That aspect had to do with the largest status of the gay people in the society over time so looked at socio-historically.

Q. And is that what appears in The Rise of A Gay and Lesbian Movement?

A. And in the first book as well.

Q. Could we then distinguish between the nature of the work you did, the original research that would go into the first book, and the original research that might go into the second book?

A. There's an analytic distinction.

Q. Tell us what it is?

A. Where in the first book, the analytical level socio-psychological, that is, it looked at the everyday life level of coping with domination. In the second book, it's at a larger scale collective level about how people, in this case, gay people, mobilize around issues of domination.

Q. Let me ask another question along these lines. Sometimes if we think of original research, we think of dealing exclusively with individuals or doing surveys and analyzing data. Now, with respect, and sometimes original research for historians will be entirely secondary research, reading other material -- not that that's any less valid -- but we're just trying to appreciate the distinction.

A. Right. This is documentary research rather than, shall we say, case study research.

Q. All right. And again, to be clear, between the two books, when you're talking about the domination theme, is it case study research or is it documentary research?

A. Also documentary.

Q. Now, aside from that work that

you, if I've got it correctly, you would characterize as original research; could you describe the nature of the work you do that is not original but, nevertheless, you rely on when you may give opinions.

A. Well, there is certainly an important body of research. One cannot do research without knowing what that research already is. One must do work within the context of a tradition in knowing what has already been found out. So I'm well versed in the research areas that we've been discussing. I am currently, as well, doing actual case study, ethnographic research on impacts of H.I.V. on family, work, and personal relationships, but that's ongoing at this moment.

Q. And if I thought about, I guess something called the literature in the area or the academic literature in the area, is that something that you, in these areas, that you would be familiar with?

A. Yes.

Q. All right. Your Honour, I think those are the questions I would ask with respect to expertise.

CROSS-EXAMINATION BY MR. BREWER:

Q. Thank you, Your Honour. Again, I must confess; I'm still a little confused as to the nature of the work you've done when you classify something as research, so bear with me while I try to clarify that. As I understand what you've told Mr.

Campbell, none of the work that you have done on any of these topics consists of case studies, experiments with people, personal observations of individuals and situations. Is that correct?

A. It does not consist of case studies. I'm not a psychologist, which is a psychological methodology; that is, psychologists typically do observations in clinical practice. Rather, as a sociologist I study culture, and as such look at the texts that are produced or the debates or dialogues or interactions or conflicts that people in groups have with each other over specific issues.

Q. As I understand your resume, essentially you're a sociologist?

A. Yes.

Q. So as a sociologist, in doing your research, have you ever done any surveys of people, actually interviewed people and discussed with them these issues you're coming to court today?

A. I've not done surveys on those issues. Here I'm relying on existing research that already exists; for example, if we're talking about frequency of sexual practices, there is a limited literature bound by the fact that only a very few researchers, some of them actually from some years back, have been funded to ask those questions, and all of us in the area are bound to rely on that existing research.

Q. Would it be a fair summary then, sir, to say that your qualifications here today are that you have extensively studied other people's work in these areas and are coming to court to report on that?

A. It's a foundation for original research. I certainly do -- what we're talking about here is the distinction between primary and secondary research both of which can be original and make contributions to understanding the phenomena we're looking at. I do do primary research as mentioned. Now, in terms of interviewing people around issues of H.I.V., I do and have done primary, secondary research in looking at socio-historical aspects of sexuality because that's really the only way you can get a handle on it.

Q. I understand that, sir, but Mr. Campbell is seeking to qualify you as in expert on three specific areas, and those are the only areas I'm addressing my questions to.

A. Okay.

Q. Now, on those three areas that you'll be asked questions today as an expert, again my question to you, sir, is: Are you saying that your expertise on those three areas consist of reviewing other people's work and then coming to court to report on what you've read other people have done and found on those three areas?

A. Yes. It does do that. However, that kind of characterization suggests it's entirely derivative in that there is no, shall we say, intellectual advance in doing that review and in organizing it and making sense of it, and I would submit that my work does make an original contribution by doing that.

Q. Now, you say that the works that you have reviewed are based on research case studies and

empirical data by those people, is that correct?

A. That's one source of information. One also looks at various kinds of documentary evidence which can be read, shall we say, symptomatically. There are, in fact, a wide variety of different kinds of sources that are relied on to do a synthetic analysis in the end.

Q. So, just so I can clarify what you've done, sir. In reviewing this material and seeing what basis were used to draw the conclusions in these materials, in your review you have not added to that by doing your own empirical studies. You have not added to it by adding further data to the conclusions. You've simply taken that data as given and then worked further to consolidate it?

A. If you define data as only primary observation or field research, then that would be largely true because the work that I've done has been synthetic or syncretic, if you like, which draws together and understands and makes theoretical advance in terms of, I guess you'd say, understanding what has been seen.

Q. Thank you, Your Honour. I have no further questions of this witness on the point of his expertise.

THE COURT: May I ask you, you're looking at the research. You're looking at other people's materials, right? Those materials, I presume, you can correct me if I'm wrong, are something with respect to happenings, occurrences, observations with respect to human activity at a different period of time than today?

THE WITNESS: Well, of course, they do extend through history.

THE COURT: No, but are they things with respect to whatever the social state of the community is at an earlier time than now?

A. Some of it is, indeed, but the work that I did does come up to date in the sense that it looks at the most contemporary research.

THE COURT: Well, what is that contemporary research? When is it? You're looking at some of your material that you research. What time period does it refer to? Is it within the last five years?

A. Well, we'd have to -- we could answer that question in relation to specific issues as to the datedness or recentness of particular research, but certainly there are a number of areas where we have research that's hot off the press, shall we say. It's as recent as we can get it.

THE COURT: Well, that's the best you can say it is?

A. (Witness nods head indicating yes.)

THE COURT: Any questions arising out of what I've just asked?

MR. CAMPBELL: No, Your Honour.

MR. BREWER: No, Your Honour.

THE COURT: Mr. Campbell, what is the issue that you say you wished to direct this evidence and that you say this evidence is admissible?

MR. CAMPBELL: Well, the first

area, Your Honour, would be with respect to sexual practices.

THE COURT: All right.

MR. CAMPBELL: I want to ask the witness some questions about -- I'll tell you the first three or four, and then there may be some subordinate ones, but you'll see where I'm going. I'm going to ask him on what he bases his opinions, and what's the most up-to-date information, and how the profession would view the reliability of that information.

In any event, the questions would be: What proportion of the population have had homosexual experiences? What proportion of the population would regularly have homosexual sexual relations? What is the specific nature of the sexual acts that those individuals might engage in? In particular, what data do we have that tells us how often anal sex might take place, and what data do we have and what would be your opinion about the frequency of that kind of sexual contact? What's the best information that you or your profession can give us about the frequency of other kinds of sexual relations that take place within the gay community?

THE COURT: Now, these are observations you seek to draw from this witness? I say observations with respect to what community -- the Canadian community?

A. No. What I'm asking him is what would be -- not what the Canadian community thought -- but what is the frequency of these various sexual activities as objective fact or the best objective evidence we can get on that subject.

THE COURT: Yes. Thank you. Is there anything you wish to say, sir?

MR. BREWER: Yes, Your Honour. While not trying to impugn the value of Dr. Adam's work, it's the Crown's position that with respect to his qualifications as an expert on these three areas, his expertise consists solely of reviews of literature of existing practices. There's been no critical analysis, nothing in the sense of challenging the data, challenging the underlying expert mechanism. In effect, what we have here is reports by somebody of what other people have found out.

I would think to qualify as an expert, the Court would want to hear from those people, the people who have come to those conclusions to challenging the data, to see if the methodology is appropriate. I don't believe that this witness, if he did not do the studies, can offer any evidence on cross-examination as to the value of the data that was drawn or the methodology was employed.

In essence, we have to almost take as given what the conclusions are because we have no opportunity to challenge them, and the people who made those studies, who did the data, should come to court if they are sought to be relied upon for the truth of what they say so the Crown has an opportunity to ask questions that would draw out any weaknesses or limitations of this data.

We're forced, in essence, to almost accept the conclusions of those studies without being about to challenge them. So on that basis, I

respectfully submit to Your Honour that if Mr. Campbell seeks to rely upon the conclusions and the data of those studies, we should have the authors of those studies here.

THE COURT: Well, in dealing with expert witnesses, it's not uncommon for expert witnesses, apart from this gentleman's field of expertise, to refer to other scholarly works, and usually counsel, in cross-examination, will have a pile of their scholarly works which they would challenge the witness. That's the ordinary way. The evidence will be allowed and you gentlemen can make your submissions as to what the weight is, if any. We'll take a recess now, and I'll be back at 11:50.

---Recess at 11:30 a.m.

---Upon resuming at 11:50 a.m.

EXAMINATION-IN-CHIEF BY MR. CAMPBELL:

REGISTRAR: You're still under oath, Mr. Adam.

MR. CAMPBELL: Q. Now, Professor Adam, let me get into the area that I wanted to ask you some questions about. But, as I do, perhaps you could just tell us, what are the principle and secondary sources on which you rely when I'm going to ask you some questions about what are the sexual norms and frequencies, etc., in the gay community by comparison to the straight community.

A. Yes.

Q. What would be the principle

sources you'd rely on?

A. I think probably the best way to proceed is for me to indicate that in relation to each question.

Q. Okay. Then let me ask you this. Can you tell us what would be your best professional opinion about the percentage of males in our society who have hade some adult homosexual experiences?

A. All right. Here, still, the classical reference is the Kinsey Report. The Kinsey Report was done a long time ago -- was published in 1948. Unfortunately, there has been no research funding to do a similar study of the scale that Kinsey did, which was a very large sample, to try to identify frequency of sexual practices in the general population.

According to Kinsey, there is a, shall we say, hierarchy of numbers related to frequency. He found that four percent of the general population engage in exclusively homosexual behaviour over the course of their lives. That twelve percent of the male population engage in homosexual behaviour for at least three years of their adult lives. And if you want to extend it to having had any kind of homosexual behaviour at any time during their lives, the number goes up to one-third of men.

Q. And when we're talking about homosexual experience, does that data tell us whether or not that is anal or oral sex or describe the nature of the activity?

A. I believe that Kinsey's approach was to interview people using a battery of questions

having to do with anal and oral sex, and mutual masturbation. His definition was a sexual contact between people of the same gender to the point of orgasm.

Q. Thank you. Now, since Kinsey, is there any research that exists in telling us or exists in forming an opinion whether or not those numbers that you just gave us from 1948 are still reliable as an indication of what the percentages would be today?

A. The kind of research that has appeared since that time has been on much smaller samples and, therefore, it's difficult to know if they're as good as Kinsey. The results tend to be similar. There are variations of a few percentage points up or down depending on the survey; but again, I would caution that they are much smaller and thereby more subject to bias.

THE COURT: All right. You've noted your cautions, but subject to those cautions, can you give us your opinion as to whether or not those percentages would today be larger, smaller, or the same.

A. Well, Kinsey is still widely cited because he is considered to have done the work that is the most reliable. I think we are all aware that historical conditions have changed considerably since 1948, so there may be reason to believe actually that the figures might be somewhat higher, insofar as we live in a less repressive era, since Kinsey was writing in the period coming up to the McCarthy era in the United States.

Q. All right. Now, I want to ask you some questions about the frequency of various kinds of sexual practice within -- I'm going to call it the gay

community, but I'm going to ask you to help us define that because I want to know about the role and the frequency of the different kinds of sexual contact in the gay community.

A. Here the research is better and more recent. The sampling technique is typically to ask or to distribute surveys to gay men where they can be found. Often in the commercial gay scenes, such as bars, through gay organizations and similar kinds of sites.

Now, recognizing that that is a sampling that is not entirely random such as one might have by sampling every third household in the city, say, there are a number of studies which come up with similar kinds of results, and because of that consistency, there's a sense of confidence among sexual scientists about those results.

Q. All right. Then, can you tell us what then would be the frequency of -- I think you mentioned three activities previously -- of oral, genital sex, of mutual masturbation and of anal sex.

A. The results are clear that among gay men that there is community norms or expectations; that the mainstream is the majority -- adopt an attitude of flexibility and that anal and oral sex are both in the repertoire of the sexual practices of gay men in Canada and the United States. As for masturbation, the studies are clear that they are virtually universal.

Q. And do the studies tell us any numbers? For example, is there a number that you could tell us that says the frequency of anal sex per month for active gay men?

A. Now we're moving from the question of whether oral and anal sex are practised, to the frequency at which they are practised?

Q. Yes.

A. Here, there is more variation. There's a study done in Toronto, actually 1990, that shows that, again, there's considerable openness to both sexual practices, but due to opportunity or availability or relationship, the actual numbers may fall as to who is actually practising anal sex in any particular month; but I think it's still fair to say that the majority of gay men do practice oral and anal sex over any given year and that actual frequency would vary by a series of variables.

Q. All right. And is there any reliable data that you can take us to on which you would form an opinion of the comparative frequency of sexual activity between gay and straight men?

A. Actually, the research there comes up with a result which is perhaps not surprising when you think about it, and that is that the people in society who have the most sex are married people. Therefore, it is the married heterosexual who have the highest frequency of sexual intercourse; single people have a lower frequency. That then raises the question of equivalent categories for gay men since marriage does not exist, and it appears that for gay men who are also single, that the rate of sexual intercourse is lower than for married heterosexuals, but then, of course, there is a proportion of gay men who are in relationships of varying duration, and they move back up to higher levels.

Q. All right. Now, the second area where I want to ask you some questions has to do with the harm, if any, that is evidenced within the gay community that is evidenced by sexual practices. And let me then start those questions, and this may repeat a little, but our question is: With respect to qualification, in your book The Rise of A Gay and Lesbian Movement, do you deal with the political and social issues within the gay community that would be of some assistance to tell us about what harmful activities take place within that community?

A. Yes. Over the last 20 years, there has been considerable debate among gay men, lesbians, and feminists over issues of acceptable and unacceptable sexuality, and I review that extensively in that book.

Q. All right. And can you tell us as well, are there political groups or causes or committees or whatever in the gay community who are dealing with the issues or the supposed issues of sexual abuse, if indeed that happens, within the gay community?

A. There's been a very small dialogue that has developed in the last three or four years in the lesbian literature considering domestic violence and the degree to which the problem, which is widely recognized in heterosexual society, affects lesbians, and there has been very little raising of the issues among gay men. It's scarcely addressed. There's certainly no scholarly research whatsoever on the topic.

Q. And are you able to form an opinion whether or not sexual abuse between gay men is a

common practice or how common a practice it might be?

A. Again, the research is slim in this area. I think that the best that can be said about it is that there are a couple of conditions that could lead us to surmise what the situation is with gay men. The first is that gay men typically are self-supporting and, therefore, are not bound to stay in relationships they don't like due to economic independence; and that there's -- I think I just lost the other point -- oh, the other point would simply be that since there's no institutionalization of marriage among gay men, again, there is no legal or social pressure to require men or to demand that they stay in relationships. Therefore, those conditions suggest that there's greater ease of moving out of relationships that have an element of coercion to them. And this may explain why there is very little discourse or research around the possibility of domestic violence or sexual abuse among gay men. It may simply be that they have the resources to avoid it in a way in which many other people, such as women who do not have independent financial means, have.

Q. Now, can you tell us, is there any reason to believe that coercive sex between gay men is a problem or an issue within the gay community?

A. It's clear that there is a subculture, a minority taste, which goes under the name of sado-masochism or bondage and discipline. It is, again, they're not solid figures as to the extent of this practice; however, one can say that if you look at the commercial gay role in any large city in the U.S. or Canada, the bars that cater to this orientation would run

one in a dozen at the very most, often less; so it is a minority taste. The issue as to whether it really does involve coercion or not is one that has been debated in the gay movement, and that is the question of whether sado-masochism and bondage and discipline represent a form of sexual theatre as opposed to any kind of real coercion. In other words, the degree to which consent underlies the appearance of coercion and that coercion is a play or a symbolic interaction in sexuality rather than an indication of any real domestic violence, for example.

Q. Fine. And can you tell us is this a significant or an insignificant issue whether this violence exists within the gay community.

A. I think that it has been debated and there is a clear consensus that it is a form of theatre between consenting actors, and that is the reason why it has not been thematized as an issue in the gay movement. And I would just add to that that there is an acute awareness and concern about violence directed toward gay men. There is also a scholarly literature that is very recently emerging on that topic, and there has been considerable concern in the gay community and the gay movement about violence towards gay men. However, these sexual activities are widely seen as not falling into that rubric as not being truly violent, but rather a form of symbolic behaviour in which consent is the underlying factor.

Q. Now, the last area I wanted to ask you about stems from, I guess, the first book that you wrote on the Survival of Domination. Perhaps you could expand briefly on what the theme of that analysis

was as you did it in that book, and I'm going to ask you how it may apply to the sexual practices within the gay community.

A. There is a chapter in that book on masochism. The reason for that is one of the concerns of that book was to look at ways in which subordinated people respond to their subordination, and one of the ways, in fact, is a form of, shall we say, involvement or even complicity with that oppression which occurs in the most extreme incidents; and the book then explores ways in which there is movement beyond masochism as a coping strategy.

Q. I think you might have to explain that a little further.

A. Sure. That masochism, of course, is merely one possibility. It's a possibility that tends to arrive in the most extremely oppressive situations and that what I found of interest in developing the book was how people who have very few resources and see very few possibilities for improving their status, nevertheless develop an empowerment and develop other ways of coping with their subordination such as ultimately organizing social movements, law reform and so on.

Q. Now, let me then ask, with respect to the practices within the gay community, are there forms of practice which illustrate the themes that you've just been speaking of?

A. Yes. I mean, clearly, within the sado-masochistic sub-culture, there is a masochistic extreme or tendency.

Q. And my next question was whether

or not that was consensual, but I think you've already answered that question.

Now, the next question is this. I have provided to you some samples of material that are in issue in this case, and I want to ask this question and perhaps wait -- maybe there's an objection to it -- but I want to ask whether or not, when you look at that material, that that material illustrates the themes that you have been speaking about here with respect to masochistic behaviour and consent.

A. I would say that it does. And I think that deserves a little explanation. What I find among those materials, and because it's not a predominant theme but it's one theme that runs through some of the material, is that some of it does involve acts of humiliation; and it occurred to me in reading that material that sometimes those texts skate, shall we say, a fine line between pleasure and danger, and the question of their being real violence or real gay bashing, shall we say, arises; but I believe that the competent reader of those texts would see that they are filled with, peppered with, signifiers that communicate that in fact this is only sexual theatre. That we see a kind of scripting which goes on which, at the risk of offending religious sensibilities, reminds me of the lives of the saints.

What we see is a kind of set-up situation where there is an expression of adoration. Where the protagonist puts himself in the position of waiting for, looking for, asking for the act of humiliation.

In the second phase we see various kinds of trials that the protagonist is subjected to and goes through, and in this third phase we see a transcendence of those acts of humiliation. In a religious sense, of course, it's an act of grace. In these vernacular texts, it's a sense of release.

But also we see a message conveyed again and again that the males who are portrayed as the aggressor in the situation are very often in this third final resolution humanized, unmasked, as not a cold aggressive dominant male, but actually a man who would be comrade. A man who, after all, could care for the protagonist.

And what I found most remarkable in looking through this material is that it was always written from the view point of the protagonist engaging in self-abasement. In other words, I did not find instances of material that was written from the point that provided a warrant for aggressive behaviour against a gay man, rather, the material was remarkable in that the gay man was always in the position of seeking the self-abasement, and ultimately for the purpose of transcending it. Therefore, rather than affirming the humiliation, ultimately the humiliation was a moment or trial undergone in order to achieve a transcendent end.

Q. Perhaps this is a simplistic question, but as you described that particular variant of the story, is that something that is consensual between the parties or nonconsensual.

A. I think I'd have to subdivide the literature. It was primarily consensual. The only time

that I saw a deviation from that was in a few stories where the protagonist does an autobiographical confession of events that occurred to him in youth. Sometimes those events which occurred in youth are portrayed as having happened in a way that was not sought out, and here it occurs to me that, again, it's from the viewpoint of the person who has been victimized. It is not the victimizer's viewpoint that we see here.

It reminds me of the incest survivors in sexual assault literature where we see people who have experienced ugly sexual incidents in their youth who attempt to come to terms with it; who attempt to begin to enunciate it in order to get past it in order to overcome it, so that's the only place in which I saw the possibility that consent was questionable, and there it's certainly not affirmed it's a good thing, shall we say. Rather, it's part of the confession of the protagonist who's talking about his sexual history.

MR. CAMPBELL: Those are my questions, Your Honour.

CROSS-EXAMINATION BY MR. BREWER:

Q. Now, Professor Adam, I'd like to explore further the last line of testimony you've given. Did you review all of the publications that are in issue in this case?

A. I reviewed a very sizeable proportion of them.

Q. You did not review all of them?

A. I received sizeable xeroxes, and I'm not entirely aware of the entire corpus.

MR. CAMPBELL: So it's clear, I did not send him copies of all of everything, so that's a fair subject for cross-examination.

MR. BREWER: Which articles or which magazines did you review?

A. My memory may fail me here, but I reviewed a lengthy book called Humongous. I reviewed many excerpted articles from many, many different magazines.

THE COURT: Well, how many books are here?

MR. CAMPBELL: There are nine publications, Your Honour.

THE COURT: Nine, thank you.

MR. BREWER: Sorry. You mentioned Humongous. Are there any other publications you can remember by name.

A. I didn't always receive a xerox of the cover, so it might be better, I mean the defence may be better able to put a figure on the proportion of material that I saw.

MR. CAMPBELL: I can assist a little bit, Your Honour, if that would help. I sent the witness excerpts from the book Hot Tricks, experts from the book Sex Stop, sent all of Humongous. You were sent one story from the magazine Bear, and you were sent brief passages from the comic book that was named Harry Chess. You were not sent any excerpts from the magazines Advocate Men, Play Guy or what's the other one? -- In

Touch or O.G. -- those four magazines.

THE COURT: Thank you.

MR. BREWER: Now, you stated that in some of these magazines, some of the articles you reviewed you found acts of humiliation.

A. Yes.

Q. Can you recall, I know this is tricky, but can you recall which of these publications you found the acts of humiliation?

A. There was one story in Humongous, though most of the stories--virtually all of the stories except for that one did not involve humiliation. So the bulk of them would have come from the other publications that were mentioned where, again, I received articles rather than the xerox of the entire publication.

Q. So, just so I understand, are you saying that the remaining publications outside of Humongous did or did not contain acts of humiliation.

A. Definitely some of them did, yes.

Q. And you can not say which ones?

A. I don't know. I didn't see the cover.

Q. Okay. What do you define personally as an act of humiliation?

A. Struggling to recall one of the stories, many of which blur together in my mind. We see a number of instances in these stories where the protagonist undergoes experiences which, at least conventionally, would be seen as distasteful, such as being urinated on, or the characters are often described as being very sweaty or dirty, and this is only a sample.

Q. Okay. Are there any other acts of humiliation, such as forced group sex, that you recall?

A. There are certainly instances of group sex. There are instances where, at least for a moment in the story, the danger is raised as to whether this is going to turn out to be coercive, and indeed, I think the narrative tension and probably the erotic tension of the story is established by the heightening of that uncertainty; but in the end, they are resolved in the direction of some kind of humanization, or again, the consent is indicated in some way or another.

Q. Do you recall any instances of bondage or restraint being exercised in the stories?

A. I should probably have a list with me that I could go through each of them and remind myself of each of the themes. I believe there are moments in which restraint is applied in certain stories. Again, within the context in which the protagonist very clearly is stated as having sought out the experience.

Q. Okay. In your opinion, in reviewing the literature, would you regard situations where a person is restrained, whether it is consensual or not, as being degrading or dehumanizing to an individual, not to that specific person, but generally speaking?

A. I'd think, again, that it would depend on the understandings that were brought into the situation. If the restraint was unconditional, and there was no ability of the restrained party to verbalize his discontent or his disinterest in the situation or to verbalize a desire to stop the situation, then we would

be into a form of restraint which would indeed be coercive and likely degrading.

However, where the behaviour is clearly sought out, and there are a number of reassurances in the text that it is enjoyed and the restraint is removed, I think it would be the understanding of any competent reader that degradation did not occur.

Q. In reviewing the materials, aside from the instances that you referred to already, did you find instances where there was an appearance of one person being in a subservient or serving role or, conversely, someone in a dominant role; in other words, there wasn't an equality of position in their relationship?

A. That's certainly true. Again, as a moment in the narrative of some of the stories. It occurs very often in stage two, as I mentioned the three stage process. It's a trial, it's a humiliation that is undergone as part of the sexual interaction.

Q. Now, in all of these instances, all of these circumstances you've described, you're considering your final view based on the ultimate resolution of a scenario, not a specific moment, like when someone is being restrained or someone is being in a subservient position; your ultimate opinion, in fact, turns a lot on how it turns out?

A. No. I would caution that there are markers along the way throughout the text through each of the stages that provide the reassurance to the reader that this is not a gay bashing, but rather a

toying with or a playing with danger. And I think that those reassurances are fundamental to the reader's interpretation as to whether this is, shall we say, really degrading or is just play acting, rather like, I think, an audience watching Hamlet; making a judgment that Hamlet is not really a blood bath, not really mass murder. It's just a play and there is a number of signs that are given to us that reassure us that the actors are not killed, and I see those kinds of signs in those stories.

Q. In reviewing these stories, where there is a -- I now use the phrase "inequality of position," whether it's a physical bondage or other emotional subservience, did you get the sense in any point in reading them that these articles portrayed the lower person. I won't say the word victim, but the lower unequal person enjoying or deriving pleasure from that experience?

A. Well, they definitely do. The articles are written overwhelmingly indeed from the viewpoint of that person. It's not the viewpoint of the aggressor who's imputing enjoyment into the subordinate person, but rather the subordinate person himself, it's his voice that we hear in the article affirming that he desires the situation and derives enjoyment out of it.

Q. And is this, would you say, a common or an even dominant theme of the articles that you read?

A. It was only a dominant theme of a minority of the articles.

Q. In taking that one step further,

in your opinion, is it possible that if a potential perpetrator, potential dominant person were to read these, could that person believe or come to believe that victims or subordinate people enjoy humiliation, degradation, and restraint? Is it possible that someone reading that could believe that?

A. That's a question that did concern me in reading through it. I think that what I find most remarkable about it is that in, again, the stories which were confessional and involved a sexual autobiography from youth, and the ones that skated closest to the area of coercive sexuality, we see that the aggressors are portrayed often as high school bullies or railway men or those kinds of characters; and it occurred to me that such people would have an extremely difficult time understanding or enjoying the text that we're looking at. That for people who are to get anything out of those texts, who are to understand them, and that requires some degree in which the reader inserts himself into the process, that there is necessarily an adoption of the viewpoint of the subordinate person.

In other words, I think this is a literature that speaks from below, and I do not see it as giving solace or encouragement to aggressors except insofar as he would be playing a role that would be defined by the subordinate person because, again, it is from the subordinate persons's viewpoint.

Q. Again, I appreciate the explanation. Just to clarify it, in your opinion, do you thing it's possible that someone who is not so artistically minded could be considered, if they were so

minded, to exercise such domination that victims enjoy these things. Is it possible that someone could believe that after reading these articles?

A. First of all, I don't think it requires any artistic mindedness in that I think these stories are all clearly written in a vernacular and are intended to be widely accessible, and I also think that certainly for gay readers that they are acutely aware of the existence of the gay bashing and are concerned about it. I mean in psychology, they even remark that, you know, a dog even knows the difference from being tripped over as to punished, and I think that any reader could understand the difference there; and it does strike me it would require a massive misreading, shall we say, of the text for there to be an interpretation that would provide warrant for any real degradation, that is, real harm as opposed to just a theatrical playing out of some kind of scenario domination.

Q. Again, Professor, is it possible that someone could believe in reading these articles that victims enjoy this kind of behaviour? I would appreciate maybe a yes or no answer at this point, so I'm clear as to what your opinion is.

A. No doubt in the realm of possibilities, remote possibilities exist, so it would be yes in that case.

Q. Thank you. Are you aware of any research being done on the effects of a person or persons who watch pornography, specifically, non-violent, what's called "common pornography," where there is no violence or dominant scenarios being played out? Are you aware of

any research on that point?

A. I would say I'm aware of the research, though somewhere at this point I should probably rule myself out of having expertise here in that I'm not fully conversant with the literature of the impacts of pornography on behaviour.

Q. To the extent that you are aware, Professor, are you aware of the works of Dolf Zillman?

A. No, I'm not.

Q. You've never heard of his studies at all?

A. I haven't read them.

Q. Are you aware of the Surgeon General's study on pornography? Surgeon General of the United States, Coop, study on pornography?

A. I'm aware of it.

Q. And you're aware that Professor Zillman wrote chapter 5 of that study?

A. As I say, again, I'm reaching a limit to my expertise, and I would, you know, readily confess that this is a literature that I can't speak authoritatively, and I don't know that commission report well.

Q. To the extent that you know the report, and know of its reputation, do you have an opinion as to the validity of the findings or its acceptance in the academic community?

MR. CAMPBELL: Your Honour, the witness is obviously trying to tell us he doesn't have expertise in this area. I'm not sure how far that it is proper to take this.

MR. BREWER: With all due respect, he did say he had heard of the report, and I don't know to the extent of which he has heard of it.

THE COURT: Well, I think he's indicated that he really doesn't have any available appreciation of it.

THE WITNESS: I think to speak authoritatively of it, I should have read it carefully and be able to assess its methodology, and that I can't do.

MR. BREWER: Q. So, in effect, as I understand your testimony, Professor, you have no expertise or knowledge in that area? The area of the harm or effects of watching pornography?

A. Well, I said that I do not know the research literature, which is overwhelmingly heterosexual, of the impact of pornography on behaviour. From my reading of the literature on gay men, there is no indication of the effect of sexual representation of any kind on behaviour of gay men.

Q. Sorry. Are you saying that there is no studies to that effect.

A. Yes.

Q. Or that the studies ---

A. No studies.

Q. So, in effect, there is, as you understand -- there is no data dealing with the topic among the homosexual community? Is that correct?

A. Yes, right.

Q. And you're not familiar with the heterosexual studies?

A. Not familiar enough to speak authoritatively.

Q. Thank you. One technical question, Professor. At the very beginning you indicated that you advised the Court of some of the data generated in the Kinsey Report, and then stated that there had been some research since that time, a much smaller sampling, as my notes indicate. You're not sure if it is as good as Kinsey, but the results are similar? Is that correct?

A. Right?

Q. So, notwithstanding your personal view of the changing climates since Kinsey, the data does indicate a similarity since that time?

A. Yes.

Q. Thank you. Dealing with your article or dealing with your testimony with respect to violence in the homosexual community, gay and lesbian, are you familiar with an article prepared by Caroline Waterman, Lori Dawson, and Michael Bologna in The Journal of Sexual Research, volume 26, No.1; February, 1989? It's entitled, "Sexual Coercion in Gay Male and Lesbian Relationships, Predicators and Implications for Support Services". Have you heard of the article?

A. I don't recall it, though I believe one of the authors indeed has produced a book which, at this point, I've seen reference to it coming out. I'm not aware if it has actually yet appeared.

Q. How would you classify or categorize the Journal of Sex Research as an academic publication? Is it respected?

A. It's respectable.

Q. I'll read to you some of the conclusions from the article, and could you indicate, please, if you have any other literature that would contradict this or any evidence that would not support these conclusions?

THE COURT: What kind of a publication is this? Is it an American study, a Canadian study, or what is it?

MR. BREWER: I'm about to refer to some of the demographics, Your Honour.

THE COURT: All right.

MR. BREWER: Q. This is a study, Professor, that was prepared at the University at Albany in the state of New York. It is a study of college students. There were 36 women and 34 men who were in gay or lesbian relationships. The study was part of a larger study dealing with conflict resolution and dealing with support services. It's 1989, and dealt with interviews of the participants on a broad range of topics and here are some of the conclusions it came to.

The results indicated that 12 percent of the gay men and 31 percent of the lesbians reported being victims of forced sex by their current or most recent partners. For men, being a victim of forced sex was generally associated with being a victim of other forms of violence.

And in the discussion at page 122:

"The results of this study suggests that sexual coercion is a problem for a considerable number of men and lesbians. Thus, accessible support services are needed, along with

programs to promote public awareness of the problem and the services."

Now, to be fair, the authors continue to talk about the limitations of the study:

"The generalization of the appropriate findings are limited by the fact that the sample was composed of a small number of college students. Furthermore, respondents were asked to participate in a study on conflict resolution. Therefore, the study may have attracted people who had high levels of conflict in their relationships. However, although further research in other populations would be very useful, the results suggest that support services are needed now."

What is your opinion on the findings that I read to you?

A. Well, in the absence of having read it, the first question that arises to me would be to look very carefully at the measure of forced sex. I presume the authors have a definition they ask their interview subjects to respond to, because one of the problems in literature in the past has been that sometimes there's an extremely wide net that's cast under that definition.

The other comment that occurs to me is reduce the historical process occurring in the gay community today of, shall we say, certain professions which are taking an entrepreneurial interest in developing new business among gay people, and we do see a growth in social work and psychological professionals who are identifying problems.

Now, one of the concerns I think that the gay community has about that is that there may be a kind of cultivation of problems in order to improve business, shall we say. So those would be the two concerns that I would have, and of course I'd need to look at the article directly to see if this is confirmed.

Q. Are you aware of any other studies on this topic?

A. Again, the only other studies that I'm aware of, as I mentioned, is that there is a book, Imminent, I think. I'm not sure if it's out yet, it might be just out. I haven't been able to read it because I haven't had access.

Q. It's not been published?

A. It's in the works as far as I know, unless it just appeared in the last few weeks.

Q. So, to narrow the question, there are no other published works available at this point in time to deal with this topic?

A. As far as I'm aware.

Q. Now, the topic of sexual practices dealing with violence in the homosexual community. How do you define violence for the purposes of your testimony?

A. I would presume that violence would necessarily be an act which lacked consent on the part of the object of that act. That would be a minimal definition. Presumable, it would be most frequently the exertion of pain upon that subject in a manner that was not desired by the subject.

Q. So I can clarify the role of

consent, is it your rule that consent, in effect, is determinative. In other words, if someone consents to pain being exerted, it is not violence any more?

A. Yes. I think that would be fair to say. I think that then moves into the arena of play acting or acting as if it were violence rather than real violence.

Q. Within the gay community, you talk in terms of a minority subculture that deals with sado-masochistic practices. How is that community perceived by the remainder of the gay community? Is that tolerated, in your opinion, by the gay community?

A. In my opinion, it is tolerated. It is part of the larger diversity of the gay community, which does have tremendous diversity and a wide range of aspects.

Q. What type of practices would involve this type of culture that you say is tolerated by the community, if you could describe to His Honour the practices we're talking about here?

A. Well, they do involve the working out of the theme of domination in relationships where there is the assumption of the role of dominance and submission in sexual interaction, though I would caution that in many instances they are roles that can be put on and taken off and, indeed, reversed.

Q. Aside from domination, is there violence towards a person?

A. I would say that ...

Q. Because of your definition of violence -- I'm sorry, was there the infliction of

physical pain on persons?

A. There can be. It's not an essential element of sado-masochism, but at times it can occur -- can be an element.

Q. And restraint or bondage?

A. It can be an element.

Q. And urination on a person?

A. Also possible.

Q. And exertion of -- And all these practices you've described, you say are generally tolerated by the gay community?

A. Yes, again, within the context that we've been discussing, that is, with the assurance that this in not, in fact, gay bashing or that it is not, in fact, unwelcomed violence; and I would think, as well, that genuinely forced sexual acts would not be acceptable by the gay community.

Q. Okay. In other words, if a person consents to someone urinating on them to someone inflicting pain upon them, this is tolerable?

A. Yes.

Q. And you do not feel that this is a degrading or dehumanizing activity?

A. No. I think that it's fair to say that there are different ways of interpreting it, and for many people it is not to their taste; but there is a general acceptance that for people from whom it is to their taste, that they can do it. They should have the right to do it.

Q. If I may have a moment, Your Honour. I was looking for a passage from Butler.

THE COURT: All right. I just have a question at this point. You say you thought by people -- they should have a right to do it? By what people?

THE WITNESS: I would say by the gay community, and I would measure that in terms of it not having been themetized as a problem in discussions in gay organizations or in the gay press or in the gay movement.

MR. BREWER: Yes. Thank you, Your Honour. I found the passage.

THE COURT: Go ahead.

MR. BREWER: Q. I'll read to you a statement, Professor, from the decision of Mr. Justice Sopinka in the Butler decision. You're familiar with that decision?

A. Yes.

Q. And I'll ask you if you agree or disagree with this statement, page 25 of the Judgment:

> "Among other things, degrading and dehumanizing materials place women, and sometimes men, in positions of subordination, servile submission, or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted act even more degrading or dehumanizing."

Do you agree or disagree with those comments?

A. They seem reasonable to me, and what I find remarkable in trying to think through that rule in terms of the material that I read, is that what seems so fundamentally different to me is rather than having the situation of, for example, having women depicted for male audiences enjoying violence and thereby providing warrant to male aggressors to inflict that violence upon women; that on the contrary, we have in this literature a situation that is consistently written from the viewpoint of the man seeking self-abasement and going out of his way to find someone to help him engage in that process and; therefore, there is a clear message that it is the man who is seeking the self-abasement who is in control and thereby there's no warrant given to any unqualified exertion of force or coercion upon the subordinate party.

Q. So I gather from that, that you have difficulties in agreeing with Justice Sopinka's statement of principles?

A. I think I'm agreeing with it in that to me, my understanding of it -- and obviously I'm not a lawyer -- but my understanding of it is that there is a concern that has come out of the women's movement that there are forms of pornography that function as a kind of hate literature which give warrant to providing, encouraging, and affirming violence against women; and this is a literature that's written by men from a male viewpoint, imputing pleasure into women in order to allow men to exert that domination. And again, what I found so remarkable about the text that I looked at was they were fundamentally the opposite of that kind of situation

where they were not written from the viewpoint of the aggressor. The aggressor was often a kind of cardboard cut-out figure in the story. They had no emotional life. All the emotional life was contained in the viewpoint of the subordinate person, and indeed, it would seem to me the only way to understand or to even enjoy the story would be that the reader would have to have some sympathy with that position; but to me, that separates it from the concern that was expressed in the quote that you just read.

Q. Since you've just raised the issue, Professor, isn't it correct to say that the principles enunciated by Justice Sopinka would appear to apply to all people, not just heterosexual people or to women but to all people?

A. Yes. I don't think what we're talking about here is excepting gay men, but rather that the nature of this particular form of erotica does not conform or does not fall into the problem that was identified in the quote that you just read. In other words, I think there's a consistent principle here, and we're not talking about exempting gay men because they are gay men.

MR. BREWER: Those are my questions for this witness. Thank you, Your Honour.

THE COURT: Re-examination?

MR. CAMPBELL: I have no questions.

THE COURT: All right. Thank you. Maybe we will take a lunch break, then, and continue at 2:15, please.

---COURT RECESSES AT 12:55 P.M.

---UPON RESUMING AT 2:15

GARY STEIN, Sworn

EXAMINATION-IN-CHIEF BY MR. CAMPBELL:

Q. Now, Mr. Stein, so everybody else knows, you are employed by my law firm; is that correct?

A. That's correct.

Q. And you've worked for me as a lawyer and an articling student for the past almost three years?

A. Almost four years.

Q. And with respect to this case, I've asked you from time to time to take some steps and go do some research on the street, if I can call it that way, and could you describe for the Court what you've done?

A. Yes. You have asked me on occasion to go to book stores, that is the book and magazine stores that the general public would frequent, and purchase magazines that would be sexually explicit.

Q. And how many times have you done that?

A. I believe I've done that on four occasions.

Q. And what stores have you gone to?

A. Generally I have gone to the World's Biggest Book Store on Edward Street and to Lichtman's in two different locations; one in the Atrium on Bay, the other on Yonge Street south of Richmond.

Q. And have you brought with you today some of the material that you've purchased on any

of those occasions?

A. I have it here in my briefcase, and I understand that there's been an exchange.

Q. Yes. Get your briefcase so we can just ...

A. Yes.

Q. Now, just tell us how many magazines you've got in there.

A. Twelve. I'm sorry, thirteen.

Q. Thirteen. And when were they purchased?

A. These magazines I would have purchased in February of this year and then just recently about a week ago.

Q. All right. And if you just might take out one or two of them so we can see. Briefly describe their appearance and their titles.

A. They're all listed, I think, on your affidavit of documents or supplementary affidavit of documents, but they all look more or less like this; they are small version sexually explicit magazines. I purchased these because they seemed to be the most sexually explicit. They tend to be letters written to the magazine which they publish and which people describe their sexual experiences.

Q. All right. And among the thirteen items, is there any difference between those which appear to appeal to gay or straight audiences?

A. Yes. There are magazines which appear to be for straight audiences; other ones which appear to be for gay audiences such as Beau magazine, and

then there's also one called Options, which appears to be for bi-sexual or homosexual community.

Q. Now, I didn't ask you to bring the material you purchased on the earlier occasions. When were those earlier occasions?

A. I went in late 1988 and early 1989, I believe, to the same types of book stores: The World's Biggest Bookstore and Lichtman's.

Q. And were the magazines that you purchased on those occasions, were they, to the best of your knowledge, were they similar to what you've got there?

A. They appear to be almost the same genre of letters that as in these that I have here.

Q. Were there any titles of the magazines that were common throughout?

A. They all refer to letters such as "Outrageous Letters" or "Red-Hot Letters;" general titles like that.

Q. And have you -- I ask you, when you say that you went and you were looking for explicit material, perhaps you can explain briefly what your measure of that was and again briefly what you found in the magazines.

A. Well, as I understood what I was doing; essentially, it was research for this type of case in which they were magazines being sold in stores to the general public that were not censored and they were to be -- those were the ones that I was going to purchase and they were going to be carried with the type of literature, I believe, that is in dispute here today.

Q. Have you indicated in some way the explicit portions of the magazines you've got there?

A. I was going through it last night and started to just turn over the page in certain spots, but I found that there's such a general sense throughout all of them of the same types of sex act that it's throughout all the magazines you find the same thing essentially.

Q. Are there text and pictures or soley pictures or soley text?

A. It's text and pictures.

Q. And is the explicit material that you see in there, does it describe in pictures or words penetration either between men and women or between women and men?

A. Yes. There is throughout the straight magazines, there is penetration, sexual intercourse, vaginal penetration, described throughout. In the gay magazines there is a description of anal penetration. Throughout, there is also, in both gay and straight, depictions of oral sex both performed on men and on women.

MR. CAMPBELL: I think, Your Honour, I suggest that we mark the whole bundle as an exhibit. So, we'll leave in the bundle something called Schedule A, which is a list of the magazines, and that would be marked as Exhibit 6.

REGISTRAR: Seven.

MR. CAMPBELL: Seven. Thank you. Those are my questions for this witness.

---EXHIBIT 7: Variety of Magazines

CROSS-EXAMINATION BY MR. BREWER:

Just briefly, Mr. Stein, when you bought those magazines at the World's Biggest Bookstore and at Lichtman's, were you aware at that time or did you become aware of how the magazines came into Canada?

A. No.

Q. Okay. So you were unaware of the origin of magazines and what processes were followed to bring them into the country?

A. Completely unaware of it.

Q. So given that, I suppose you are unaware of whether or not customs looked at the shipments or anything like that?

A. I am unaware except to the extent in reviewing the material last night, I saw on certain pictures there is a tiny black spot. Obviously someone reviewed that and made a decision to black it out.

Q. Are you suggesting, then, that from that you're deducing that it was customs?

A. No, I'm not.

Q. So, then, your evidence is that you do not know whether customs stopped shipments and whether customs in fact did any kind of examination of these things?

A. That is my evidence.

MR. BREWER: Thank you.

MR. CAMPBELL: No re-examination.

THE COURT: Thank you.

JOHN SCYTHES, Sworn

EXAMINATION-IN-CHIEF BY MR. CAMPBELL:

Q. Mr. Scythes, first of all, could you tell the Court what you do for a living?

A. I own Glad Day Bookshop.

Q. All right. I'll get back to that in a minute. Perhaps just for the record, you could tell the Court your personal history starting with university and briefly where you have been employed up until the time you have become associated with Glad Day.

A. Yes. Very briefly, I graduated from the University of Toronto in 1970 with a degree in science from the faculty of arts and science. I spent ten years working in the family business and became a division manager, Scythes and Company, Limited. I then swore those years of industrial maintenance and became a licensed plumber and electrician under the Ministry of Labour and for several years ran a small renovating business. I'm a plumber and electrician by trade. In January, 1991, I purchased the Glad Day Bookshop.

Q. And prior to the purchase of the bookshop were you familiar with the store and its operations?

A. I knew the previous owner fairly well, and I was an occasional customer, maybe once every six months to a year for fifteen years at least.

Q. For the record, is Glad Day a corporation?

A. It's incorporated under Ontario by-laws, yes.

Q. Where is it located?

A. 598 Yonge Street.

Q. And could you just describe the store to us briefly, so we know something about that.

A. It's a twelve hundred square foot space that contains about 7,000 titles mainly of a sexuality orientation type, meaning that they primarily cater to gay and lesbian people: fiction, AIDS, psych and sociology, politics, and a corner of sexually explicit material.

Q. And roughly with what proportion of the 7,000 titles might be what you would describe as sexually explicit material?

A. At the most, a hundred.

Q. A hundred out of 7,000?

A. Yeah.

Q. Okay. Now, we've heard evidence here, although we haven't really been discussing it in detail, of the detention by customs of certain magazines, and I just want to ask you about -- These are already, I believe, in exhibit; these are certain issues from 1989 of three magazines, one called Advocat Man, one called Play Guy, and one called In Touch. Are those magazines -- Do you carry those magazines?

A. When they come through, yes. Sometimes issues are not released in Canada.

THE COURT: What did you say?

THE WITNESS: Sometimes issues are not released in Canada, Your Honour.

THE COURT: Thank you.

MR. CAMPBELL: Q. And how often are they published, to the best of your knowledge?

A. Monthly or bi-monthly.

Q. And when you say sometimes they don't come through, could you just explain what that means?

A. Well, I'm not party to the exact process, but I assume they may be decided that there's too much explicit material, so they either don't submit it to the process of being examined or it is overly edited, and then the American publisher decides to withdraw that issue from the Canadian market. In other words, they won't publish the censored version.

Q. I think that may require a little explanation. When you say the "censored version," what does that mean?

A. Well, as I said, I'm not party to the exact process, but Metro Toronto News avails themselves of a process of putting most of these magazines into the Canadian marketplace by prior submission of the material for an examination process, which I'm not familiar with.

Q. And when you get the magazines, are there portions of them that are censored?

A. Usually.

Q. And how does that -- How would that appear to a stranger looking at the magazine?

A. The sentence is stopped or pages are blanked out or there are black dots over explicit sexual -- pictorial explicit conduct.

Q. Now, there were two other magazines, again, which are already before the Court; one called Bear, and the other called O.G., or "Oriental

Guys." Are those magazines that you sell from time to time?

A. Not Bear, but Oriental Guy, yes.

Q. And then there are four -- I'm missing one copy -- but there are four books; one called Hot Tricks, and one called Sex Stop, one called Humongous that are subject to this action; and have you on occasion had those books to sell?

A. Later editions or, shall we say, the same publishers changed the titles to some other catchy thing like Well-Hung or Over 18 or Hot and Ready or something like that, but those are before my time; but similar titles have been available in the store from time to time.

Q. Would they be among the titles that you described as dealing with explicit sexual material?

A. Yes.

Q. When you said a hundred out of 7,000?

A. Yes, they'd be part of that.

Q. Now, when you are importing books from the United States, just briefly describe the process that you would go through with Canadian customs as you experience it as a book dealer in Toronto.

A. Well, most of our shipments come through United Parcel Service and, as is required, all titles are listed on a manifest; and at certain times Canada Customs will stop the shipment and examine either new controversial titles which may be suspicious in terms of their titles or may have been previously known, or

they may just decide to examine a particular shipment more carefully. Again, it's a process to which I am not party. Sometimes shipments are stopped and certain titles are either sent to Ottawa for determination or are returned. Sometimes they are simply returned by the customs' officials, and other times we ask that they are returned.

THE COURT: Returned to sender?

THE WITNESS: Return to sender, yeah.

Mr. Campbell: Q. Now, with reference to this materal, because this is what's before the Court, is there any prejudice to you in your view with respect to this process?

A. Well, in my opinion, it's problematical. It would be nice to resolve it. It's financially sometimes difficult because of the freight having to be paid both ways and the inconvenience for all parties.

Q. And when we're talking about the seizures, how many issues of the various items might we be talking about? Are we talking about one or more than one?

A. Are you referring to monthly magazines?

Q. Let's talk about -- I think the records will tell us precisely, but are you importing more than one copy of various items?

A. Well, as I explained to you, the magazines we do not import; they come from McLean Hunter through Metro Toronto News. The book titles that we import would be in quantities of ten, twenty, something

like that; and they would appear -- let's say, ten copies would have those books like Sex Stop or something like that amongst, perhaps, a hundred fifty titles; and maybe five or six hundred books, there would maybe be between ten and fifty books on certain orders -- not all the time -- that would be subject to examination. Remember that Inland Book Company is only one of our suppliers. It's usually from the Inland Book Company in Conneticut, who distributes all of these titles in the U.S. that we purchase them from; they're a large distributor of about thirty million dollars a year in books and this is one of the lines they distribute. Leyland Publishers is an example of the publisher that I think is responsible for some of the books that you have there.

Q. All right. And last question. Are there any books or types of books that you don't or refuse to sell at the store?

A. I certainly don't sell pedophilic material, and to my knowledge I've never sold anything that has resulted in sanctionable activity like bondage, as was discussed by the expert witnesses before; so I think I consciously shied away from those areas as a matter of social responsibility.

Q. All right. No further questions.

CROSS-EXAMINATION BY MR. BREWER:

Q. Just so I understand, again, what proportion of your sales deal with this kind of material

as I note here? Am I correct in stating that your evidence is that approximately 100 of about 7,000 publications deal with this kind of material? I don't know if that's the correct figure.

A. It would probably be fair to say that would be the maximum number of controversial titles.

Q. So it's fair to say it's not a significant portion of your stock in trade, your business?

A. It would be unfair not to say that they disproportionately sell better; meaning if they were available, they sell a little better. So, it would be unfair to say that it was only 1.4% or whatever. That would be unrepresentative. It would be probably fairer to say that it would be 2 or 3 or 4%.

Q. I know that you're new to the operation of the bookstore, but in the time period you've operated the store, do you have any views as to whether the business that you're running today would be financially viable if you did not sell those publications at all?

A. It would be financially viable, but it would certainly change the scale of the business a certain amount, remembering that the magazines are something we do not import, and they are a certain amount of the business as well.

Q. Now, again, sir, do you have any impression in running the store as to what proportion of your total clientele come to your store exclusively for these publications?

A. You're referring to the magazines

as well? In other words, what I delineated as the sex corner?

Q. That's right exactly.

A. Maybe one in six. Maybe one in ten. Probably more on Friday night and less at other times. The magazines are of course less costly than books.

Q. Certainly. One other area I wish to explore with you, sir, is the review process. Have you ever been involved in a process whereby a sample of a proposed importation is submitted to, let's say, Canada Customs to obtain a preliminary view?

A. You mean prior to trying to import it?

. Q. Trying to import a large shipment to save your costs and get basically an advanced ruling. Have you ever availed yourself of that process?

A. No. I have never been advised or understood that it was available.

Q. Do you understand if the suppliers or the distributors of these materials avail themselves of this process.

A. Not that's resulted in me receiving any information which would have been, like, "Oh, you can import a hundred of these now or 25 of these now because Canada Customs says it's okay." I think I would have heard that because people want to sell into a marketplace.

Q. The reason that I'm exploring these is because you indicated in your testimony that certain publications are received that obviously have

been reviewed; phrases have been deleted, areas have been covered up.

A. That's the magazines, sir, which I do not import. They are imported by McLean Hunter, Metro Toronto News; and the process is a prior submission by the American Publishers of these magazines, and these magazines appear throughout metropolitan Toronto. The same ones that you find in Glad Day Bookshop you find at Dunn and Queen and Dunn Milk. I've checked them out; they're there.

So you are aware of a prior submission process?

A. There is a process.

Q. And you've never availed of that process for these publications?

A. No, sir.

MR. BREWER: Thank you. Those are my questions for this witness, Your Honour.

MR. CAMPBELL: No re-examination.

Whereupon Court adjourns at 4:00 p.m.

--- Submissions heard the following day, May 14, 1992, not transcribed.

CERTIFIED:

Ann Crowe

Ann Crowe
Official Court Reporter
Ontario Court of Justice